In the Supreme Court of the United States.

CHARLES L. BENEDICT, APPELLANT,
v.
THE UNITED STATES.
No. 435.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The claimant was duly appointed in the month of April, 1865, by the President of the United States, judge of the district court of the United States for the eastern district of New York, and occupied such position until the 20th of July, 1897, when, having attained the age of 70 years and upward, he resigned his office, pursuant to section 714 of the Revised Statutes of the United States.

During said period, and pursuant to the act of February 7, 1873, the provisions of which are now embodied in sections 613 and 658 of the Revised Statutes of the United States, the claimant held the six terms of the

circuit court of the United States for the southern district of New York established in said act exclusively for the trial and disposal of criminal cases, from the date of the passage of the act of February 7, 1873, to the time of his resignation from office, and received for holding each of said terms the sum of $300, the same being paid to him by the United States marshal for the southern district of New York, pursuant to sections 613 and 597, Revised Statutes of the United States.

The same was paid upon a voucher in substance as follows:

> UNITED STATES OF AMERICA,
> *Southern District of New York.*
>
> I, Charles L. Benedict, district judge of the eastern district of New York, hereby certify that I have held the circuit court of the United States for the southern district of New York at the —— term thereof, provided for by section 613 of the Revised Statutes of the United States, and that I am entitled to receive therefor the sum of $300, as provided in said section.
>
> (Signed) CHARLES L. BENEDICT
> (and dated).
>
> Received of —— ——, United States marshal for the southern district of New York, the sum of $300 in full of the above account.
>
> (Signed) CHARLES L. BENEDICT.

Such payments to the claimant by the marshal were from time to time allowed in the marshal's accounts and paid to him out of the appropriations for defraying the expenses of courts of the United States. The total amount thus paid annually to the claimant was $1,800.

During the year previous to the claimant's resignation he received the said $1,800 for that year, in accordance with the provisions of sections 613, 658, and 597 of the Revised Statutes of the United States, and also the salary of $5,000 payable to him, as provided by the act of Congress of February 24, 1891 (24 Stat. L., 783), out of the appropriation to pay the salaries of district judges of the United States.

Since his resignation the claimant has received as salary, pursuant to section 714 R. S., the sum of $5,000 per annum only, his claim for the payment of $1,800 annually in addition having been rejected by the Auditor, to whom it was presented. Accordingly, on April 14, 1899, the claimant brought suit in the Court of Claims for the sum of $3,150, alleged to be the amount of salary still due him under the provisions of said section 714 R. S. Judgment was rendered by the court in favor of the defendants, dismissing the petition. From that judgment the claimant has made this appeal.

ARGUMENT.

The counsel for claimant at the outset states the question involved in this case to be whether the appellant shall, by reason of his resignation from the office of district judge of the United States—

> lose $1,800 a year for the rest of his life, *or* receive from the United States the same compensation which had been for over twenty years paid him for his judicial services.

This is a most moving presentation of the situation. It gives a pathetic view of the result which must follow

upon the success of the defense—the determining that Judge Benedict, having grown old in distinguished and honorable service of the Government, must in his last years suffer diminution of his income by reason of the resignation of his office made imperative, doubtless, by failing health,—which one would rather not have in mind in discussing this case.

And so I much prefer the more coldly exact statement of the issue, also made by counsel for claimant, which was commended by the court below for its clearness and terseness, namely:

> Was this $1,800 paid to Judge Benedict yearly for twenty-four years and provided for by section 613, Revised Statutes of the United States, a part of his salary which was by law payable to him?

Counsel for claimant has treated this question as though it involved the determination of the general definition of the term "salary," and has sought to establish that by this term is meant any reward or recompense for services rendered, citing decisions going to show that salary and wages are synonymous, and that in some cases a salary may be mere *per diem* compensation. It seems to me that a discussion of these authorities and a consideration of this view of the subject are not instructive in arriving at a determination of the question here in issue. Conceding that in some instances wages and salary express practically the same thing and that the *per diem* pay of a page of the House of Representatives is a salary, because so designated in the Revised Statutes of the United States, it does not appear to me that these facts have any true bearing upon the question. The

salary which we are called upon to inquire into in this case certainly stands upon a higher plane than the salary, if such it be, of a page of the House of Representatives, for instance. It is the salary of a judge of a United States court that is here under consideration, and it would seem that it may fairly be described as—

> Not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense of an annual or periodical payment for services, a payment depending on the time and not on the amount of the services rendered. (*Thompson* v. *Phillips*, 12 O. St., 617–18.)

An examination of the decisions in which the definition of the word salary has been considered will disclose that this limited or more dignified view of the term has been widely adopted.

> The term salary denotes a recompense or consideration to be paid a public officer for continuous as distinguished from particular services, and may be denominated annual or periodical wages or pay. (*Landis* v. *Lincoln Co.*, 31 Ore., 427.)
>
> As to officers having salaries the rule is believed to be universal that their compensation is established—"decreed by authority and for permanence," and that such salaries are paid to them at stated times. (*Dane* v. *Smith*, 54 Ala., 49.)
>
> The rule of fixed compensation by time that constitutes the earmark of salary. (*State* v. *Murphy*, 24 Fla., 33.)

In *Castle* v. *Lawler* (47 Conn., 345,) the compensation of a tax collector was adjudged to be a salary because—

> It is a fixed sum which he is to receive for his services as collector during his term of office, which is one year; and that makes it salary.

> Salaries are a per annum compensation to men in official and some other situations. (*Cowdin* v. *Huff*, 10 Ind., 85.)

In *People* v. *Myers* (42 Albany Law Journal, p. 332,) the words salary and wages are carefully considered and distinguished and a number of authorities are cited. In the course of its discussion of the question the court uses the following language:

> "Wages earned" is an apt expression in regard to laborers who are only entitled to pay for services actually rendered, but is entirely inappropriate when used concerning public officers or clerks who receive annual salaries which are not due until the expiration of the year, and are entitled to be paid so long as they hold their offices or places, without regard to the services rendered.

This definition of salary as an annual or periodical compensation for services is found in nearly every dictionary, whether law or general.

> Salary. Money paid at regular periods for services rendered. (English (1889); Abbott; Tomlins; Jacobs.)
>
> The per annum compensation to men in official and in some other positions. (Anderson.)
>
> An annual compensation for services rendered. A fixed sum to be paid by the year for services. (Black; Burrill.)
>
> Stipend or annual allowance. (Rapalje & Lawrence; Wharton.)
>
> The recompense or consideration stipulated to be paid to a person periodically for services. Usually a fixed sum to be paid by the year, half year or quarterly. (Century.)

> A periodical allowance, as a compensation to a person for his official or professional services, or for his regular work. (Standard, 1895.)

Webster uses the following definition amongst others:

> Annual or periodical wages or pay.

Unquestionably these definitions of salary as applied to the compensation of the higher grade of public officials in the Government service are in accordance not only with the common acceptation of the meaning of the term, but with exact facts as well. The salaries of such officials will invariably be found to be fixed in amount and for a definite period of continuous, not particular, service; payable at stated times without reference to the amount, but only to the duration, of service. Without exception, too, such salaries are annual.

In determining, then, what was the salary of Judge Benedict which was by law payable to him at the time of his resignation—the salary which he received during the year previous to his resignation,—we look for an official compensation received by him having the characteristics above enumerated; and we find it in the $5,000, which was admittedly salary.

Its amount had been fixed by the act of February 24, 1891 (1 Supp. R. S., chap. 287, p. 896), in the following language:

> That the salary of the several judges of the district courts of the United States shall hereafter be at the rate of $5,000 per annum.

It was payable in monthly installments, pursuant to paragraph 4, chapter 130, 1 Supplement Revised Statutes, page 320.

It was payable without reference to the amount of official service rendered by him and, indeed, though he rendered none at all. It was secured to him during his natural life upon a condition that only made it doubly sure. Finally it was protected from all possible danger of diminution during his term of office by the Constitution of the United States.

Now, according to the contention of the claimant, $1,800 was added to his official salary by the act of February 7, 1873, and became thereafter a part of that salary. But it is clear that it could not thus be added to and become a part of the original official salary of Judge Benedict, unless, like that salary, it were itself a fixed annual compensation; and yet it was not that in any sense. It was not paid for annual official services, nor even with reference to any period of time. It was, indeed, in no respect a fixed sum of $1,800, but was ascertained by adding together six $300 payments, made during the year, to be sure, but each of which was a separate and distinct payment, having no dependence upon nor relation to any of the others. Each of these payments was a lump sum paid in consideration of the performance of a particular task—the holding of a criminal term of the southern district of New York. The duration of these various terms thus held during the year was, in the nature of things, indefinite and variable. The time thus employed might vary from a few days to two or three weeks, and yet the compensation was in each case the same.

It had not that quality of "fixed compensation by time that constitutes the earmark of salary."

The distinction between this compensation and the official salary of claimant is made most strongly apparent by considering his relations to each at the time of holding one of these criminal terms of the southern district of New York. While holding such term he was performing a service for which he was entitled to receive the sum of $300, and during that period his entire time was devoted to the earning of this particular sum; yet meanwhile his salary of $5,000 was going on without interruption, although for the time being he was performing no services whatever of which the same was compensation. The salary was his by virtue of the lapse of time, being appurtenant to his official position. The $300 was his by virtue of performing a particular task, and he was not entitled to the same until that task was completed.

Again, this $1,800 alleged salary had not the element of certainty. In order that the claimant might receive the same during the year he must hold each one of the six terms already referred to; but the holding by him of these terms rested upon several contingencies. To begin with, they were not a part of his absolute official duty at all. By the terms of the statute, section 613, Revised Statutes, they—

> may be held by the circuit judge of the second judicial court and the district judges for the southern and eastern districts of New York, or by any one of the said three judges.

Hence Judge Benedict could hold one of these terms only by reason of some mutual agreement between himself and the other two judges qualified to hold the same

term, and clearly, if this arrangement were not made, but the term were held by the three judges or by one of the other two, as authorized by the statute, he would not be entitled to the $300 payment. Again, he might be prevented from holding one or more of these terms by sickness or other incapacity, in which case, of course, he would not receive the payment therefor. Moreover, these terms are created by statutory enactment, and by the same token are subject to change. If Congress in its wisdom should lessen the number of these terms, of course the amount of compensation to be derived each year by the claimant through holding them would be correspondingly lessened. And, furthermore, there would seem to be no limitation upon the power of Congress to diminish the amount of these payments. In fact, no such limitation can be claimed except by begging the very question which we are here debating—whether such payments are a part of the official salary of the claimant. But if the conclusion be reached that this alleged $1,800 yearly salary is subject to diminution and even extinction during any year, we are confronted with an anomalous condition of affairs. The claimant's salary would then consist of two parts—one fixed and protected from diminution by the Constitution of the United States, and the other contingent and variable and unprotected by this constitutional guaranty.

The claimant urges, to be sure, that as a matter of fact he has held every one of these terms since the passage of the act by which they were created up to the time of his resignation, a period of twenty-four years. But this, it

seems to me, only emphasizes the above argument. It is a matter of congratulation to Judge Benedict that he was thus fortunate in the continuance of his health and strength, but it is evident that it was because of his unusually vigorous constitution thus evinced that he was enabled to receive during all those years this so-called salary, and that fact would seem to make the same, unlike the ordinary judicial salary, contingent upon good health instead of good behavior.

And here an incongruity might be suggested by way of final illustration of the unsoundness of the claimant's contention. Suppose, as might very well be, that the claimant, after holding every one of these terms for twenty-three years, should, in the following year, have been wholly prevented from holding one of them and at the close of the twenty-fourth year been absolutely obliged, by continuous ill health, to retire from his official position. In that event, since this $1,800 had not been received by him during the year previous to his resignation, the salary now claimed by him would be but $5,000, despite the twenty-three years during which he had received, as he contends, $6,800 annual salary.

Counsel makes the inquiry: "If the sum thus paid to Judge Benedict every year was not 'salary,' what was it?"

This seems to be a fair question, although it might reasonably be met with the answer that if it is not shown to be salary it is immaterial for the purposes of this action what it is. But to answer the question. If we look to the statute under which this payment is made it is not at all certain in the light thus given that it is not in

the nature of a reimbursement for expenses. The statute seems to carefully refrain from describing it as compensation. But it does say that it shall be paid in the manner now prescribed by law for the payment of expenses of another district judge while holding court in said district. Section 597 Revised Statutes, United States, contains the provision here referred to, and in accordance therewith each of these $300 payments has been made to the claimant precisely as though they were intended for payment of his expenses, being made by the United States marshal for the southern district of New York upon the voucher presented to him by the claimant certifying that the term had been held by him and containing his receipt for the payment. The fund out of which these payments were made was the appropriation for defraying the expenses of the courts of the United States.

These facts are not presented as forming a conclusive answer to the question of counsel, but they certainly do squint toward the conclusion that in part at least this payment was mere reimbursement for expenses. But, treating these payments as compensation purely, it nevertheless by no means follows that they must receive the definition of "salary." There seems to be no reason why they should not be treated as extra allowances or compensation for extra services performed by the judge of the eastern district of New York and authorized by law to be paid; just such compensation, we find, as is contemplated by section 1765, Revised Statutes.

It is very strenuously urged in behalf of the claimant that it is a hardship and that an injustice will be done him if it be held that he is entitled on his retirement to an income from the Government $1,800 less than was paid him while occupying his official position. If this results from the clear meaning of the law applicable to the case there is, of course, no legitimate ground for complaint, but in any event a plea of injustice and hardship must always have its weight and should be squarely met, if possible.

It seems to me that the facts do not fairly sustain any such proposition. It is true, as urged, that if the $1,800 in question was not a part of the salary of Judge Benedict, he must choose, in contemplating retirement, between a diminution of his income on resigning his office or a continuance in the same beyond the time when he is entitled by law to retire. But the answer to this is that in giving up the $1,800 he also lays down the burden which accompanied it. As already pointed out, while his undisputed salary of $5,000 is payable to him irrespective of the amount of work which he is able to perform, and even though incapacitated by illness to perform any services, yet in order that he might be paid this $1,800, he was forced to hold each one of the six terms specified. And at his age, and with his undoubted physical infirmities, he might well prefer to relieve himself of the extra work thus laid upon him by retirement upon the same salary as is payable to every other district judge throughout the United States on retiring. It certainly seems very like a fair state of things that on resigning his

office and being relieved absolutely from all official services, he should receive exactly the same amount that any one of his brother judges receives in the same honorable retirement.

The Court of Claims held that this extra compensation was not a part of the salary "by law payable" to Judge Benedict when he retired. It seems to me that this decision should be sustained.

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Assistant Attorney-General.